PIHAK BERKUASA NEGERI SABAH

v.

SUGUMAR BALAKRISHNAN & ANOTHER APPEAL

FEDERAL COURT, KUALA LUMPUR
WAN ADNAN ISMAIL CJ (MALAYA)
MOHAMED DZAIDDIN FCJ
ABDUL MALEK AHMAD FCJ
[CIVIL APPEAL NOS: 01-1-99(S) & 01-2-99(S)
23 MAY 2002

IMMIGRATION: *Cancellation of entry permit - Sabah State Authority - Judicial review - Right to be heard - Whether available - Whether removed by provisions of Immigration Act 1959/63 - Whether constitutional rights infringed - Whether constitutional rights can be taken away in accordance with the law - Immigration Act 1959/63, ss. 59, 59A, 65(1)(c), Pts. 1 to V1 & V11 - Federal Constitution, arts. 5, 8*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Cancellation of entry permit by Sabah State Authority - Judicial review - Whether excluded by the combined effect of ss. 59 & 59A Immigration Act 1959/63 - Whether reasons for cancellation need not be given - Whether reasons furnished could not be examined in court proceedings - Immigration Act 1959/63, ss. 59, 59A, 65(1)(c), Pts 1 to V1, V11*

CONSTITUTIONAL LAW: *Fundamental liberties - Cancellation of entry permit by Sabah State Authority under s. 65(1)(c) of Immigration Act 1959/63 - Right to be heard and judicial review - Whether excluded by s. 59 & 59A of Act - Whether arts. 5 & 8 of Federal Constitution infringed in view thereof - Whether amended s. 65(1)(c) of Act contravenes Agreement Relating to Malaysia 1963 & Report of the Inter-Governmental Committee 1962*

STATUTORY INTERPRETATION: *Constitution - Article 5(1) - Interpretation of "personal liberty" - Whether includes facets that are an integral part of life and matters which go to form the quality of life*

The respondent was a Negeri Sembilan-born Malaysian who went to Sabah in 1975 to work as a teacher. He later qualified as a lawyer and practised law in the state since 1985 under a work pass issued to him pursuant to reg. 16(1) of the Immigration Rules 1963. As he was not a person belonging to Sabah under s. 71(1) of the Immigration Act 1959/63 ('the Act'), he was required to obtain a pass to enter and remain in Sabah under

s. 66(1) of the Act. In 1995, the respondent applied for an entry permit of two years and it was not disputed that on the completion of the two years, he was to be treated as a person belonging to Sabah under s. 71(1) of the Act. However, about six weeks before the expiry of the two-year period, the respondent was served with a notice by the Director of Immigration Sabah ('the Director') cancelling his entry permit under s. 65(1)(c) of the Act. The notice was issued under the direction of the State Authority pursuant to s. 65(1) of the same. The respondent applied to the High Court for an order of *certiorari* to quash the decision of the Director but that was dismissed by the learned judge. On appeal, the Court of Appeal set aside the order of the learned judge and granted the application of the respondent. That led to the appeals before this court.

The issues were: (1) whether the cancellation of the respondent's entry permit under s. 65(1)(c) of the Act was excluded from judicial review in view of the combined effect of ss. 59 and 59A of the same; (2) whether s. 65(1)(c) of the Act which falls under Pt. V11 of the Act prevails over any inconsistent general provisions of Pts. 1 to V1 of the Act in their application to Sabah and Sarawak; (3) whether the State Authority must state its reasons for the cancellation and whether the court was empowered to examine the reasons furnished later in court proceedings; (4) whether the exclusion of the right to be heard under s. 59 of the Act infringed arts. 5 and 8 of the Federal Constitution (' the Constitution'); and (5) whether the amendment to s. 65(1)(c) of the Act was retrospective and contravened the Agreement Relating to Malaysia 1963 and the Report of the Inter-Governmental Committee 1962.

Held:

Per Mohamed Dzaiddin FCJ

[1] Section 59A of the Act was replaced with a new section by the Immigration (Amendment) Act 1997. The explanatory statement to the Bill, which is an aid to interpretation, states that the new s. 59A seeks to provide for the exclusion of judicial review in any court of any act done or any decision made by the Minister or the Director-General, or in the case of an East Malaysian state, the state authority under the Act, save for questions on procedural compliance. Also, the marginal note to the section reads: "Exclusion of judicial review". While the marginal note cannot control the language in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind. Also, the language in s. 59A is explicit with respect to the exclusion of the judicial review. By deliberately spelling out that there shall

be no judicial review, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act. (pp 124 h, 125 a-i & 126 a-d)

[2] The doctrine of substantive fairness cannot be invoked as a separate or additional ground of judicial review of an administrative decision with Parliament having excluded judicial review under the Act. It is not permissible for the courts to intervene and disturb a decision that statutorily cannot be reviewed on the basis of a new amorphous and wide ranging concept of substantive unfairness which even the English courts in common law have not recognised. (p 126 f)

[3] Part V11 of the Act prevails over any inconsistent provisions in Pts. 1 to V1 thereof in their application to Sabah and Sarawak as special law. This was one of the terms of participation of Sabah and Sarawak in the new Federation of Malaysia based on the report of the Inter-Governmental Committee. In dealing with Pt. V11, the constitutional recognition under cl. (3) of art. 9 of the Federal Constitution must not be forgotten in relation to the special position of Sabah and Sarawak where Parliament may impose restrictions. Whilst cl. 2 of art. 9 provides that every citizen has the right to move freely throughout the Federation and to reside in any part thereof, it is subject, *inter alia*, to cl. 3 by virtue of s. 60(2) of the Malaysia Act 1963. (pp 130 e-i, 131 a-i & 132 a)

[3a] Section 64(1) of the Act employs clear language by the words "subject to and in accordance with this chapter" meaning that the application of Pts. 1 to V1 is dependent and conditional upon Pt. V11. Since Pt. V11 has been provided as special law, the general provisions of Pts. 1 to V1 must give way to the special provisions of Pt. V11 in accordance with the principle of *generalibus specialia derogant*. (p 132 c-d)

[4] Section 65(1)(c) of the Act does not impose an express statutory duty on the appellant to give reasons to the respondent. Insofar as the common law is concerned, the trend of law is towards giving reasons but on a case by case basis. The trend of law has not lost sight of the established position of the law that there is no general duty universally imposed on all decision-makers. Further, the Director could not be expected to provide reasons to the respondent since the Director was merely carrying out the directions of the appellant. Accordingly, in the exercise of the powers conferred upon the

appellant by s. 65(1)(c) of the Act, the appellant was not required to give reasons. It followed therefore that any reasons furnished by the State Authority later in court proceedings cannot also be examined and taken into account. (p 134 a-f)

[5] This court disagreed with the Court of Appeal that the words "personal liberty" in art. 5(1) of the Constitution should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life. Other matters which go to form the quality of life has been similarly enshrined in Pt. 11 of the Constitution under "Fundamental Liberties". The entry permit only allows the respondent to enter and reside in Sabah, but *ipso facto* does not confer any right to livelihood upon the respondent. As the respondent was not a person belonging to the State of Sabah, he could not have been accorded any right to earn a livelihood in that state. (pp 137 h-i & 138 a-b)

[6] There is a strong presumption of the constitutionality validity of an enactment or the impugned section with the burden of proof on whoever alleges otherwise. Article 8(1) of the Constitution which provides that all persons are equal before the law and are entitled to the equal protection of the law and art. 9(1) of the Constitution which gives the citizen the right to move freely throughout Malaysia and to reside in any part thereof, are subject to cl. (3) of art. 9 of the Constitution which, according to *Andrew Harding's Law, Government and the Constitution in Malaysia*, "clearly refers to Sabah and Sarawak, both of which enjoy such a special position. The purpose of the qualification is to ensure that constitutional challenges cannot be brought against these States in respect of their special immigration powers which may be used to control entry from Peninsular Malaysia." Also, it is clear from the authorities that the constitutional rights as guaranteed under art. 5(1) of the Constitution can be taken away in accordance with law. Hence, s. 59 of the Act which removes the *audi alterem partem* rule, which was duly enacted by Parliament is valid and constitutional. (p 139 d-h & 140 a)

[7] By virtue of the Immigration (Amendment) Act 1997 which came into force on 1 February 1997, the words "exercise any discretion vested in him to" were deleted. The amendment to s. 65(1)(c) has no retrospective effect having regard to the fact that the amendment came into force on 1 February 1997 and the respondent's entry permit was cancelled on 12 November 1997. It would be unlawful for the Director to avail himself of the provisions of s. 65(1)(c) prior to the amendment. He had to act under the amended section. (pp 140 f-i & 141 a-d)

[8] The respondent had no accrued rights acquired under the entry permit. The entry permit only allowed the respondent to enter and reside in Sabah for two years lawfully and did not confer any right to livelihood upon the respondent. Neither the personal affairs relating to his family nor his legal practice were accrued rights conferred by the entry permit. (p 141 e-i)

[9] The respondent could not be said to have any legitimate expectation that his entry permit would not be cancelled given the express provision under the Act that such entry permit might be cancelled any time. In addition, there was no promise or representation made by the appellant that his entry permit would not be cancelled. (p 142 b)

[10] The amendment to s. 65(1)(c) of the Act merely took away the discretion vested in the Director in complying with the directions of the State Authority. The amendment does not in any way affect the rights and powers of the state as regards immigration matters. As such, there is no requirement for compliance with arts. 161(E)(2) and 159(3) of the Constitution. The spirit and intention of the Agreement Relating to Malaysia 1963 and the Report of the Inter-Governmental Committee 1962 had not in any way been contravened. The respondent had not shown that the amendment was unconstitutional and since it is trite that a statute is always presumed constitutionally valid until proved otherwise, the amended s. 65(1)(c) of the Act was therefore valid. (pp 143 a-c)

[Appeal by appellant allowed; appeal by respondent dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden seorang rakyat Malaysia kelahiran Negeri Sembilan pergi ke Sabah pada 1975 untuk bekerja sebagai guru. Kemudiannya, beliau layak sebagai seorang peguam dan mengamalkan undang-undang di sana semenjak 1985 di bawah permit kerja yang diberikan kepadanya berdasarkan per. 16(1) Peraturan-Peraturan Imigresen 1963. Memandangkan beliau bukan kelahiran Sabah di bawah s. 71(1) Akta Imigresen 1959/63 ('Akta tersebut'), beliau diperlukan untuk mendapatkan pas untuk memasuki dan tinggal di Sabah di bawah s. 66(1) Akta tersebut. Pada tahun 1995, responden memohon permit masuk selama dua tahun dan tidak dipertikaikan pada penghujung dua tahun tersebut, beliau akan dilayan sebagai seorang milik Sabah di bawah s. 71(1) Akta tersebut. Bagaimanapun, enam minggu sebelum berakhirnya tempoh dua tahun, responden diberikan notis oleh Pengarah Imigresen Sabah ('Pengarah') membatalkan permit masuknya di

bawah s. 65(1)(c) Akta tersebut. Notis tersebut dikeluarkan atas arahan Pihak Berkuasa Negeri berdasarkan s. 65(1) Akta yang sama. Responden memohon kepada Mahkamah Tinggi untuk suatu perintah *certiorari* untuk membatalkan keputusan Pengarah tetapi ditolak oleh hakim yang bijaksana. Setelah merayu, Mahkamah Rayuan mengetepikan perintah hakim yang bijaksana dan membenarkan permohonan responden. Ianya membawa kepada rayuan-rayuan di mahkamah ini.

Isu-isunya adalah: (1) sama ada pembatalan permit masuk responden di bawah s. 65(1)(c) Akta tersebut dikecualikan daripada semakan kehakiman jika dilihat daripada kesan bersama ss. 59 dan 59A Akta yang sama; (2) sama ada s. 65(1)(c) Akta tersebut yang jatuh di bawah Bahagian VII Akta tersebut mengatasi peruntukan-peruntukan umum Bahagian I hingga Bahagian VI Akta tersebut yang tidak konsisten bila terpakai kepada Sabah dan Sarawak; (3) sama ada Pihak Berkuasa Negeri mesti menyatakan sebab-sebab untuk pembatalan dan sama ada mahkamah berkuasa untuk memeriksa sebab-sebab pembatalan yang dinyatakan kemudian di dalam prosiding mahkamah; (4) sama ada penafian hak untuk didengar di bawah s. 59 Akta tersebut melanggar per. 5 dan per. 8 Perlembagaan Persekutuan ('Perlembagaan'); dan (5) sama ada pindaan kepada s. 65(1)(c) Akta tersebut mempunyai kesan terkebelakang dan melanggar *Agreement Relating to Malaysia 1963* dan *Report of the Inter-Governmental Committee 1962*.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Seksyen 59A Akta tersebut telah diganti dengan seksyen baru oleh Akta (Pindaan) Imigresen 1997. Kenyataan penjelasannya, yang mana membantu terjemahannya, menyatakan bahawa s. 59A yang baru memperuntukkan penafian semakan kehakiman di dalam mana-mana mahkamah ke atas mana-mana tindakan atau keputusan Menteri atau Ketua Pengarah, atau di dalam kes negeri Malaysia Timur, Pihak Berkuasa Negeri di bawah Akta tersebut, kecuali persoalan-persoalan ketaatan prosedur. Juga, nota catitan tepi kepada seksyen berbunyi: "Exclusion of judicial review". Biarpun, nota tepi tidak menguasai bahasa seksyen tersebut, sekurang-kurangnya dibenarkan untuk mendapat satu pertimbangan terhadap tujuan umum dan elak mudarat yang ditujukan. Juga, bahasa di dalam s. 59A adalah jelas berkenaan penafian semakan kehakiman. Dengan secara sengaja menyatakan bahawa tiada semakan kehakiman, Parlimen tentu bertujuan bahawa seksyen tersebut adalah muktamad tentang penafian semakan kehakiman di bawah Akta tersebut.

[2] Doktrin keadilan substantif tidak boleh dirayu sebagai berasingan atau tambahan asas semakan kehakiman di bawah Akta tersebut. Adalah tidak dibenarkan untuk mahkamah masuk campur dan mengganggu satu keputusan yang secara statut tidak boleh disemak atas sebab konsep baru tiada keadilan substantif yang tidak jelas dan terlalu umum di mana mahkamah-mahkamah common law Inggeris sendiri tidak kenal pasti.

[3] Bahagian VII Akta tersebut mengatasi peruntukan-peruntukan Bahagian I hingga Bahagian VI yang tidak konsisten jika dipakai kepada Sabah dan Sarawak sebagai undang-undang khas. Ini adalah salah satu terma-terma penglibatan Sabah dan Sarawak di dalam Persekutuan Malaysia yang baru berdasarkan kepada laporan Jawatankuasa Antara Kerajaan. Bila berhubung dengan Bahagian VII, kl. (3) per. 9 Perlembagaan Persekutuan mesti diambilkira berdasarkan kedudukan istimewa Sabah dan Sarawak di mana Parlimen boleh mengenakan sekatan. Sementara kl. 2 per. 9 memberikan setiap warganegara kebebasan untuk bergerak dan tinggal di mana-mana bahagian Persekutuan, ianya tertakluk, *inter alia* kepada kl. 3 berdasarkan s. 60(2) Akta Malaysia 1963.

[3a] Seksyen 64(1) Akta tersebut menggunakan bahasa yang jelas melalui perkataan "subject to and in accordance with this chapter" yang bermakna pemakaian Bahagian I hingga Bahagian VI bergantung kepada Bahagian VII. Memandangkan Bahagian VII telah ditentukan sebagai undang-undang khas, peruntukan umum Bahagian I hingga Bahagian VI mesti memberi laluan kepada peruntukan khas Bahagian VII bersamaan dengan prinsip *generalibus specialia derogant*.

[4] Seksyen 65(1)(c) Akta tersebut tidak mengenakan tanggungjawab statutory yang jelas kepada perayu untuk memberikan alasan-alasan kepada responden. Setakat berkaitan dengan common law, undang-undang semasa menuju kepada pemberian alasan-alasan mengikut alasan tetapi mengikut kes-kes. Ikutan semasa undang-undang tidak lari daripada kedudukan undang-undang yang jelas bahawa tiada tanggungjawab umum yang dikenakan kepada pembuat keputusan. Lagi, Pengarah tidak diharapkan untuk memberikan alasan-alasan kepada responden memandangkan Pengarah hanya menjalankan arahan-arahan perayu. Seterusnya di dalam menjalankan kuasa-kuasa yang diberi kepada perayu oleh s. 65(1)(c) Akta tersebut, perayu tidak perlu memberikan alasan-alasan. Seterusnya apa-apa alasan yang diberikan oleh Pihak Berkuasa Negeri di prosiding mahkamah kemudiannya tidak boleh diperiksa dan dipertimbangkan.

[5] Mahkamah ini tidak bersetuju dengan Mahkamah Rayuan bahawa perkataan "personal liberty" di dalam per. 5(1) Perlembagaan sepatutnya diterjemahkan untuk dimasukkan semua pandangan yang merangkumi sebahagian kehidupan dan perkara-perkara yang membentuk kualiti kehidupan. Perkara-perkara lain yang membentuk kualiti kehidupan telah dimaktubkan di dalam Bahagian II Perlembagaan di bawah "Fundamental Liberties". Permit masuk hanya membenarkan responden masuk dan tinggal di Sabah, tetapi *ipso facto* tidak memberikan hak mencari nafkah kepada responden. Oleh kerana responden bukan individu milik negeri Sabah, beliau tidak diberikan hak mencari nafkah di negeri tersebut.

[6] Ada anggapan yang kuat tentang kesahihan perlembagaan sesuatu enakmen atau seksyen yang meragukan dengan beban pembuktian ke atas sesiapa yang mendakwa sebaliknya. Perkara 8(1) Perlembagaan menyebut semua orang adalah sama di sisi undang-undang dan berhak untuk mendapat perlindungan sama rata di bawah undang-undang dan per. 9(1) Perlembagaan yang memberi hak kepada warganegara untuk bergerak bebas di seluruh Malaysia dan tinggal di mana-mana bahagian, adalah tertakluk kepada kl. (3) per. 9 Perlembagaan yang, menurut *Andrew Harding's Law, Government and the Constitution in Malaysia*, merujuk secara jelas kepada Sabah dan Sarawak, kedua-duanya mendapat kedudukan istimewa. Tujuan pengkelasan ialah untuk menentukan pertikaian perlembagaan tidak boleh dibawa terhadap negeri-negeri ini berdasarkan kuasa istimewa imigresen mereka yang boleh digunakan untuk mengawal kemasukkan dari Semenanjung Malaysia. Seterusnya, adalah jelas daripada autoriti-autoriti bahawa hak-hak perlembagaan yang dijamin di bawah per. 5(1) Perlembagaan boleh diambil keluar berdasarkan undang-undang. Oleh itu, s. 59 Akta tersebut yang menidakkan kuasa *audi alteram partem*, yang telah digubal oleh Parlimen adalah sah dan berperlembagaan.

[7] Disebabkan Akta (Pindaan) Imigresen 1997 yang berkuatkuasa pada 1 Februari 1997, perkataan-perkataan "exercise any discretion vested in him to" telah dibuang. Pindaan kepada s. 65(1)(c) tidak berkuatkuasa terkebelakang dengan mengambil kira fakta bahawa pindaan tersebut berkuatkuasa pada 1 Februari 1997 dan permit masuk responden telah dibatalkan pada 12 November 1997. Adalah tidak sah untuk Pengarah mengambil kesempatan peruntukan s. 65(1)(c) sebelum pindaan. Beliau mesti bertindak di bawah seksyen yang dipinda.

[8] Responden tidak mempunyai hak tambahan di bawah permit masuk. Permit masuk hanya membenarkan responden memasuki dan tinggal di Sabah secara sah selama dua tahun dan tidak memberikan hak mencari nafkah kepada responden. Urusan peribadinya mahupun amalan guamannya bukan hak-hak tambahan yang diberikan oleh permit masuk tersebut.

[9] Responden tidak boleh dikatakan mempunyai harapan sahih bahawa permit masuk beliau tidak akan dibatalkan memandangkan peruntukkan bertulis di bawah Akta bahawa permit masuk tersebut boleh dibatalkan pada bila-bila masa. Tambahan pula, tiada janji atau pernyataan dibuat oleh perayu bahawa permit masuk beliau tidak akan dibatalkan.

[10] Pindaan kepada s. 65(1)(c) Akta tersebut hanya mengambil kuasa budi bicara yang diberikan kepada Pengarah di dalam mematuhi arahan Pihak Berkuasa Negeri. Pindaan tersebut tidak di dalam apa-apa cara mengganggu kuasa dan hak negeri berkenaan perkara-perkara imigresen. Oleh itu, tiada keperluan untuk mematuhi per. 161(E)(2) dan per. 159(3) Perlembagaan. Tujuan dan semangat *Agreement Relating to Malaysia 1963* dan *Report of the Inter-Governmental Committee 1962* tidak pada apa cara dimungkiri. Responden tidak menunjukkan bahawa pindaan tersebut tidak mengikut Perlembagaan dan memandangkan adalah kelaziman bahawa sesuatu statut dianggap mengikut Perlembagaan sehingga dibuktikan sebaliknya, pindaan s. 65(1)(c) Akta tersebut adalah sah.

Rayuan perayu dibenarkan; rayuan responden ditolak.]

Case(s) referred to:

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1985] 1 AC 374 ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia [1979] 2 MLJ 101 ***(refd)***

DR Fraser and Co Ltd v. Minister of National Revenue [1949] AC 24 ***(refd)***

Government of the Federation of Malaya v. Surinder Singh Kanda [1961] 27 MLJ 121 ***(refd)***

Government of Malaysia & Ors v. Loh Wai Kong [1979] 2 MLJ 33 ***(foll)***

Government of Malaysia & Anor v. Selangor Pilot Association [1977] 1 MLJ 133 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 ***(refd)***

JP Berthelsen v. Director General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 ***(refd)***

Marta Stefan v. General Medical Council [1999] 1 WLR 1293 ***(refd)***
Merdeka University Bhd v. Government of Malaysia [1982] 2 MLJ 243 ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 2 MLJ 116 ***(refd)***
PP v. Su Liang Yu [1976] 2 MLJ 128 ***(refd)***
PP v. Yee Kim Seng [1983] 1 CLJ 38; [1983] CLJ (Rep) 824 ***(refd)***
Pyx Granite Co Ltd v. Ministry of Housing and Local Government & Ors [1960] AC 260 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 ***(refd)***
S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 ***(refd)***
Stephens v. Cuckfield Rural District Council [1960] 2 QB 373 ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor [1998] 3 CLJ 85 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 78
Federal Constitution, arts. 5(1), 8(1), 9(2), (3), 13, 159(3), 161E(2), (4)
Immigration Act 1959/63, ss. 9(1)(c), 59A, 65(1)(c), 71(1)
Immigration Regulations 1963, reg. 16(1)

Other source(s) referred to:
Andrew Harding's Law, Government and the Constitution in Malaysia, p 225
De Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th edn, pp 252-253

For the State Authority Sabah - Stephen Foo Kiat Shim (Athmat Hassan)
For the Sabah Immigration Director - Zaitun Zawiyah Puteh
For the respondent - Muhammed Shafee Abdullah (Rajasegaran K); M/s Sugumar & Co
Thomas Akin Jelimin watching brief for Government of Sarawak

[Appeal from Court of Appeal, Civil Appeal No: S-01-202-97]

Reported by Usha Thiagarajah

JUDGMENT

Mohamed Dzaiddin FCJ:
Both appeals arose from the decision of the Court of Appeal given on 17 June 1998 which allowed an appeal of Sugumar Balakrishnan, the respondent herein, against the decision of Ian Chin J of the High Court

Kota Kinabalu made on 26 December 1997 dismissing his application for an order of *certiorari* to quash the Director of Immigration Sabah's Notice of Cancellation of Entry Permit and its decision to cancel the respondent's entry permit dated 12 November 1997. (The State Authority Sabah is the appellant in Appeal No. 01-1-99 and Sugumar is the appellant in Appeal No. 01-2-99. Hence, reference to parties herein is according to Appeal No. 01-1-99).

Factual Background

The respondent is a Negeri Sembilan-born Malaysian who first went to Sabah in August 1975 to work as a teacher. Later he qualified as a lawyer and since 1985 he has been practising law in the State under a work pass issued to him under reg. 16(1) of the Immigration Regulations 1963. As he is not a person belonging to Sabah under s. 71(1) of the Immigration Act 1959/63 (the Act), he is required to obtain a pass to enter and remain in Sabah under s. 66(1) of the Act. Sometime in 1995 he applied for an entry permit which was granted to him on 27 December 1995 for a period of two years. It is common ground that on the completion of two years, the respondent would be treated as belonging to Sabah under s. 71(1). However, on 12 November 1997, which was about six weeks before the expiry of the two-year period, the respondent was served with a notice of cancellation of entry permit dated the previous day under s. 65(1)(c) of the Act. This notice was signed by the Director of Immigration Sabah (the director) under the direction of the State Authority pursuant to the powers conferred under s. 65(1) of the Act. The notice states as follows:

> NOTICE OF CANCELLATION OF ENTRY PERMIT
> Section 65(1)(c) Immigration Act 1959/63
> (Amended 1997)
>
> To: Sugumar Balakrishnan of Kota Kinabalu.
>
> Whereas you, Sugumar Balakrishnan I/C No 4548121, has been granted entry permit to reside in Sabah *vide* Ref. No. CIM/EP/21072 issued on 27 December 1995 at Kota Kinabalu.
>
> NOW, KNOW YOU, That I, Abdullah Sani bin Sulaiman, State Director of Immigration, Sabah by virtue of the directive by the State Authority of Sabah under s. 65(1)(c) of the Immigration Act 1959/63 do hereby forthwith cancel the entry permit issued to you and your presence in the State of Sabah is declared unlawful.
>
> Upon receiving this order you are summoned to appear at the Immigration Office 6th Floor, Wisma Dang Bandang, Kota Kinabalu, Sabah on or before 18 November 1997 for further action.

Signed

(ABDULLAH SAM SULAIMAN)
DIRECTOR OF IMMIGRATION,
STATE OF SABAH

Dated this: 11 November 1997.

At the same time, the respondent was also served with a copy of a special pass which allowed him to remain in Sabah for seven days.

On 17 November 1997, the respondent was granted leave by the High Court to apply for an order of *certiorari* to quash the decision of the director dated 12 November 1997, but failed to obtain a stay of the cancellation of the entry permit. The stay was subsequently granted by the Court of Appeal. In the meantime, the State Authority was allowed to join as a party to the substantive motion.

On 26 December 1997 lan Chin J dismissed the respondent's motion with costs and held:

(1) that any challenge to the act or direction given to the director by the State Authority under s. 65 of the Act cannot be questioned by the court because it is caught by the privative clause in s. 59A except for questions relating to compliance with procedural requirements of the Act or regulations governing those acts or decisions;

(2) that there is a proviso in s. 64(1) that the operation of s. 14 shall be subject to and in accordance with Cap 2 of Part VII, which means that s. 14 must be read subject to ss. 62-74 of the Act. Therefore, by cancelling the respondent's entry permit under s. 65 instead of s. 14, the director had not committed an error of law;

(3) that s. 59 of the Act, as amended, provides that any order of the State Authority does not require the giving of an opportunity to be heard. In this case, the director has no discretion but to cancel the entry permit as directed by the State Authority. Hence, the act or the decision of the director also enjoys the exclusion of the right to be heard;

(4) In addition, since the cancellation was done in accordance with the law, there is no question of s. 59 violating art. 5(1) or 8(1) of the Federal Constitution;

(5) that by virtue of ss. 59 and 59A there is no duty on the director to give any reasons for cancelling the respondent's entry permit.

Proceedings In The Court Of Appeal

The Court of Appeal on 17 June 1998 allowed the appeal, set aside the order of the trial judge and ordered that *certiorari* be issued to remove and quash the cancellation of the respondent's entry permit.

The approach of the Court of Appeal in dealing with the appeal, as stated in the judgment of Gopal Sri Ram JCA, seems to be this. His Lordship felt that it was sufficient to dispose of the appeal by considering two matters. First, with regard to the learned judge's conclusion that there had been no error of law. Secondly, the duty upon a public decision maker to act fairly and in this context the doctrine applies to the facts of the instant case. His Lordship however found it necessary to deal with some points which he considered are relevant to the case. The first point is on the effect of s. 59A and its applicability to the director. For reasons stated by his Lordship which we will discuss later, he was of the view that s. 59A could not and did not preclude the High Court from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds.

Secondly, his Lordship considered ss. 9(1)(c), 59 and 65(1)(c) of the Act which were cited by counsel during argument. On s. 9(1)(c), his Lordship considered the meaning of the words "if he is satisfied" and "morality" appearing therein. Relying on the well-established authority of *Merdeka University Berhad v. Government of Malaysia* [1982] 2 MLJ 243, his Lordship stated that the satisfaction to which the section refers is objective and not subjective. After discussing the principle of legislative intention and relying on two Indian cases and an Australian High Court decision, his Lordship held that the word "morality" means "public morality" and not the private or personal morality of an individual.

On s. 59, he noted that the language in which the section has been couched shows that it is the intention of Parliament to do away with the *audi alterem partem* rule. In his view, the rules of natural justice are a flexible concept whose categories are not closed and that they merely form part of a wider doctrine of the duty to act fairly.

On s. 65(1)(c) he agreed with the interpretation given by the learned High Court judge that there is no residual discretion on the director and therefore the act or decision of the director following a direction of the State Authority is really the act or decision of the latter. His Lordship also questioned whether s. 65(1) gives untrammelled power under the Act to the State Authority to direct the cancellation of an entry permit. He answered in the negative.

It is now important to summarise the reasons of the Court of Appeal in allowing the appeal. See: [1998] 3 CLJ 85. According to Gopal Sri Ram JCA, (at p. 105) two matters are sufficient to dispose of the (first) appeal. The first point was whether or not there was an error of law. The second concerns the duty upon a public decision maker to act fairly and the application of that doctrine to the facts of the present case. His Lordship began by considering s. 9(1)(c), where during the argument before the learned High Court judge, it was on record that the learned State Attorney General drew the attention of the court to the section and informed the learned judge that he was relying on it. Yet, the learned judge went on to decide the matter based on s. 14 without giving any reason why he rejected that s. 9(1)(c) was applicable. However, since his Lordship had earlier held that the State Authority must act in accordance with s. 9(1)(c) when exercising its power to direct the director under s. 65(1), he was therefore of the view that the learned High Court judge misdirected himself in law when he failed to give any regard to the provisions of s. 9(1)(c) of the Act.

Next, his Lordship found that the learned trial judge had approached narrowly the question whether the decision to cancel the entry permit was vitiated by an error of law. His Lordship referred to two passages in the High Court judgment which demonstrated this narrow approach of the learned trial judge. He stated that an error of law in the context of public law is a broad concept. It is not limited to a mere misconstruction by a public decision-maker of the provision of the empowering statute. His Lordship also noted that the learned judge did not appear to have evaluated the affidavit evidence presented to him and failed to address his mind to the evidence led before him. In the result, his Lordship formed an opinion that the validity of the cancellation of the entry permit should be examined against s. 9(1)(c) of the Act. In light of the section, he proceeded to examine the affidavit of Datuk Ghulam Jelani bin Khanizaman which showed the considerations that were taken into account in exercising the power to cancel the respondent's entry permit. Based on this affidavit, his Lordship arrived at the following conclusions:

(1) that the reasons disclosed in Datuk Ghulam Jelani's affidavit are open to curial scrutiny;

(2) that upon examination it is found that the respondent's entry permit was directed to be cancelled because of his private morals;

(3) that such consideration is not one of those prescribed by s. 9(1)(c) of the Act pursuant to which provision the State Authority admittedly acted; and

(4) that in the result the decision to cancel the respondent's entry permit was not in accordance with law.

On the second point ie, the duty to act fairly, his Lordship observed that the judgment of the learned trial judge made it plain that he was of the view that s. 65 is a special provision uncontrolled by any of the other provisions in the Act. His Lordship continued (p. 125):

> It must then logically follow that a State authority of an East Malaysian State has unfettered power to regulate immigration within its borders. The judgment when read as a whole certainly conveys the impression that such a conclusion appealed to the judge as being correct in law. Regrettably, however, we must enter our most vigorous dissent against such a proposition. While the East Malaysian States have certain rights and privileges reserved unto them by the Federal Constitution, particularly in matters pertaining to immigration, they, like the Federal Government and the Government of any of the West Malaysian States, are bound by the terms of the Federal Constitution. Indeed, there is none within the shores of Malaysia who is ever so high that the supreme law is not above him. Every public decision-maker, including the State authority of an East Malaysian State is accordingly under a duty to observe the provisions of the Federal Constitution. And it is an elementary principle of our constitutional law that no Act of Parliament may authorise a public decision-maker to act contrary to the supreme law.
>
> Article 8(1) of the Federal Constitution strikes at the heart of arbitrariness in public decision-making and imposes a duty upon a public decision-maker to act fairly. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor. (supra).* The second Respondent before us is no different from any other public decision-maker. It too is under a duty to act fairly in exercising the powers conferred upon it by the Act.

Following his general observation on the duty to act fairly, his Lordship discussed the recent development in administrative law as a result of the landmark decision of the Federal Court in *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147. His Lordship stated (at pp. 128-129):

> The result of the decision in *Rama Chandran* and the cases that have followed it is that the duty to act fairly is recognised to comprise of two limbs: procedural fairness and substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision-maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance.

In the context of the present case, his Lordship concluded (p. 129):

> Although the learned judge referred to *Rama Chandran* in his judgment, he did not, as will appear in a moment, sufficiently appreciate the wealth of public law jurisprudence flowing from the majority judgments in that case. Indeed the learned judge entirely missed the issue central to the case and canvassed at length before him by the appellant's counsel. It therefore behoves us to address the point fully and deal with the application of the doctrine of fairness to the present instance.

His Lordship went on to deal with the applicability of the doctrine of fairness in the instant case. He found it desirable to consider both the procedural and substantive aspects, although he was fully conscious that in the instant case the procedural limb was not strictly necessary. However, what prompted him to do so was because of the views expressed by the learned trial judge on the duty to give reasons. So, his Lordship's finding was this (p. 131):

> Fourth and last, we are in agreement with so much of the learned judge's judgment that holds that the first Respondent need not furnish reasons for cancelling the appellant's Entry Permit. Where we part company with the learned judge is the grounds he has advanced for his conclusion. In our judgment, neither section 59 nor section 59A have the effect of excluding the duty to give reasons. As we have earlier said, all that section 59 does is to deprive an aggrieved person of the benefit of the *audi alteram partem* rule. Upon its language it certainly has no effect upon other facets of the duty to accord procedural fairness, including the duty to give reasons. Similarly, section 59A is an attempt to immunize decisions made under the Act. It has not the effect the learned judge thought it had. In our judgment, the true principle upon which the first Respondent ought not to be required to furnish reasons in a case under section 65 of the Act is that he is a mere amanuensis of the second Respondent. Even if he does furnish reasons, all he can say is that he acted in accordance with the direction given him by the second Respondent. Since we already know this from the terms of section 65, it becomes unnecessary for the court to look to the first Respondent for his reasons. But we must say in all fairness to the first Respondent that the incumbent to that office did in fact file an affidavit in the court below in which, apart from making some very general statements, he says he cancelled the appellant's Entry Permit because he was directed to do so by the second Respondent.

On substantive fairness, his Lordship held that the learned judge erred in not considering, where there was material before him, whether the decision to cancel the respondent's entry permit was substantively fair. His Lordship approached this issue of substantive fairness in the following manner. The question that fell for determination was whether a reasonable State

Authority would have directed the cancellation of the respondent's entry permit on the basis of the facts upon which the State Authority had acted. Having regard to the objective facts of the case, his Lordship answered in the negative. His Lordship also rejected the submission of the learned State Attorney General that based on policy considerations it was entirely a matter for the State Authority to decide the kind of persons who should be permitted to belong to the State of Sabah under s. 71 of the Act. According to his Lordship, the State Authority must exercise its powers in accordance with the articles in the Federal Constitution which confer fundamental liberties. In the result, he held that the decision of the State Authority to direct the cancellation of the respondent's entry permit was not substantively fair.

For reasons which we have summarised above, the Court of Appeal allowed the respondent's appeal on 17 June 1998 and ordered that *certiorari* be issued to remove and quash the cancellation of the respondent's entry permit.

Appeals To The Federal Court

Both sides lodged separate appeals against the judgment of the Court of Appeal. Leave to appeal was granted by this court on 3 May 1999 to determine the following questions of law:

1. Whether the combined effect of the exclusion of the right to be heard provided in s. 59 of the Immigration Act 1959/63 ("the said Act") and the ouster clause provided in s. 59A of the said Act has excluded review in respect of the direction given by the State Authority under s. 65(1)(c) of the Act on any ground except in regard to any question relating to compliance with any procedural requirement of the Act or the regulations governing that act or decision.

2. Whether the provisions of Parts I to VI of the said Act in their application to Sabah and Sarawak as a special law shall be read subject to the provisions of Part VII of the Act such that the provisions of Part VII of the said Act shall have the effect of prevailing over any inconsistent provisions of Parts I to VI of the said Act in their application to Sabah and Sarawak as a special law.

3. Whether in exercise of the powers conferred upon the State Authority by s. 65(1)(c) of the Act to give any directions, it is required to give reasons and if s. 65(1)(c) does not require the State Authority to give any reasons, whether the court is empowered to examine the reasons furnished by the State Authority later in the court proceedings commenced by the respondent to challenge the decision of the State Authority.

4. Whether the exclusion of the right to be heard as provided in s. 59 of the Immigration Act 1959/63 ("the said Act") in particular matters relating to the cancellation and revocation of the respondent's entry permit which effectively deprives the respondent his right to livelihood is unlawful and unconstitutional in the light of the express guarantees enshrined in arts. 5 and 8 of the Federal Constitution.

5. Whether the amendment effected to s. 65(1)(c) Immigration Act 1959/63 ("the said Act") by the Immigration (Amendment) Act 1997 which came into force on the 1st day of February 1997 does not and cannot operate retrospectively so as to prejudice or affect the accrued rights of the respondent, which rights were available to the respondent prior to the said amendment and that alternatively the said amendment is unconstitutional as it contravenes the spirit and intention of the Agreement Relating Malaysia 1963 and the Report of the Inter Governmental Committee 1962 (in particular Chapter III).

Proceedings In This Court

Before us, the arguments of counsel proceeded in numerical order of the above five questions of law and reliance was placed on the respective oral and written submissions.

Question No. 1

The primary submission of the learned State Attorney General Datuk Foo is that s. 59A of the Act has effectively excluded any judicial review from the jurisdiction of the courts in respect of any act or decision of the State Authority made under the Act except on the question relating to any compliance with any procedural requirement of the Act or any regulations governing that act or decision. He pointed out that under s. 65(1)(c), no procedural requirement is provided for the State Authority to comply with before giving directions to the director. As such, there was no non-compliance of any procedural requirement by the State Authority and accordingly s. 59A applied in the present case. Datuk Foo further contended that the fact that s. 59A was amended in 1997 replacing the former s. 59A with a wider ouster clause clearly shows that the legislative intention was to deliberately exclude the act or decision of the Minister or the Director General or in the case of an East Malaysian State, the State Authority, from judicial review except in respect of non-compliance with any procedural requirement under the Act or regulations. He submitted the Court of Appeal was wrong in ignoring the clear wording of s. 59A which has ousted the jurisdiction of the court in respect of *certiorari* proceedings questioning the decision of the State Authority under the Act. Moreover, Parliament may also by clear words exclude the principles of natural justice eg, the

right to be heard (*S. Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors.* [1982] CLJ 65; [1982] CLJ (Rep) 314.) Therefore, the Court of Appeal erred in going against the basic principles of interpretation.

Next, Datuk Foo submitted that the Court of Appeal was wrong in holding that the right to seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art. 5(1) of the Federal Constitution. This was contrary to the decision of the Federal Court in *Government of Malaysia & Ors. v. Loh Wai Kong* [1979] 2 MLJ 33, (per Suffian LP at p. 34-35) that art. 5(1) speaks of personal liberty, not liberty *simpliciter* and refers to rights relating to the person or body of the individual and do not include right to travel overseas and to a passport. Besides, art. 5(1) is not an absolute prohibition but permits deprivation of life or personal liberty in accordance with law. For the above proposition, the learned State Attorney General relied on *Public Prosecutor v. Yee Kim Seng* [1983] 1 CLJ 38; [1983] CLJ (Rep) 824 and *Government of Malaysia & Anor v. Selangor Pilot Association* [1977] 1 MLJ 133 PC at p. 135.

The last important submission on this issue is that judicial review through supervisory jurisdiction may also be excluded by legislation passed by Parliament as in s. 59A of the Act. Datuk Foo relied on *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 (per Edgar Joseph Jr. J (as he then was)) which held that the High Court can review the decision of public authorities and inferior tribunals unless there is express statutory direction to the contrary. In *R. Rama Chandran v. Industrial Court of Malaysia & Anor.* (*supra*, at p. 177), Edgar Joseph Jr. FCJ stated that:

> It is clear law that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of common law and is available in the exercise of the courts' inherent power but, I would hasten to add, its extent may be determined not merely by judicial development but also by legislative intervention.

In response, Encik Muhammad Shafee reaffirmed the proposition of law laid down by the Court of Appeal that judicial review is a basic and essential feature of the Federal Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is excluded the Federal Constitution will cease to have effect and the constitutional and legal protection afforded to the citizen would become illusory. Thus, the essence of the Court of

Appeal judgment, according to counsel, is that any decision of an inferior tribunal or any public decision-maker will not be immunized from judicial review by an ouster clause however widely drafted. Counsel referred to the judgment of the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 at p. 101 (per Edgar Joseph Jr, FCJ) that:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the "not to be challenged, etc" kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, inferior Courts.

Encik Shafee referred us also to de Smith, Woolf & Jowell on *Judicial Review of Administrative Action*, 5th ed on the effect of ouster clause, pp. 252 and 253:

> Where a statute seeks to oust the jurisdiction of the courts to review the decisions of an inferior body, there is a compelling inference that Parliament did not intend that body to be the final arbiter of its own powers. There is therefore a presumption that any error of law committed by that body is reviewable, whether or not the error is one of jurisdiction in the narrow sense.

The issue here is whether the combined effect of ss. 59 and 59A has removed the powers of judicial review of the court in respect of the direction by the State Authority under s. 65(1)(c) of the Act. The wider issue is whether statutory provisions of the type stipulated in s. 59A can preclude the court from exercising its powers of judicial review over the decision of public decision-makers. The Court of Appeal said it cannot.

We shall now examine ss. 59 and 59A of the Act. Section 59 states that no person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General makes any order against him in respect of any matter under the Act. The section was amended to include the State Authority of the East Malaysian States.

Next, s. 59A (before its amendment) reads as follows:

> An order of the Minister or the Director General under this Act or any subsidiary legislation made under this Act shall (without prejudice to any provisions giving a right to appeal to the Minister in respect of an order of the Director General) be final and shall not be called in question in any court on any ground whatsoever.

The section was replaced with a new section by the Immigration (Amendment) Act 1997 (Act A 985) with effect from 1 February 1997 which reads:

Exclusion of judicial review

59A. (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.

(2) In this section, "judicial review" includes proceedings instituted by way of:

(a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;

(b) an application for a declaration or an injunction;

(c) any writ of *habeas corpus*; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

The explanatory statement to the bill, which is an aid to interpretation, states that the new s. 59A seeks to provide for the exclusion of judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority under the Act save for questions on procedural compliance. It is also to be noted that there is a marginal note to the section which reads: "Exclusion of judicial review". "While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind" (*Stephens v. Cuckfield Rural District Council* [1960] 2 QB 373 at 383). Thus, it is clear from the explanatory statement that the intention of Parliament in amending s. 59A by providing new provisions is to exclude judicial review by the court of any act done or any decision of the Minister or the Director General or the State Authority under the Act except on grounds of procedural non-compliance of the Act or regulations governing the act or decision. In *D.R. Fraser And Company, Limited v. Minister of National Revenue* [1949] AC 24 at p. 33, Lord MacMillan in giving the opinion of the Judicial Committee of the Privy Council said:

> When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately.

Secondly, in our view, s. 59A is more elaborately expressed and more exclusionary in its scope. Whereas the repealed section provides that an order of the Minister, the Director General or the State Authority under the Act or any subsidiary legislation shall without prejudice to any provisions giving right to appeal to the Minister in respect of the order of the Director General, be final and shall not be called in question in any court on any ground whatsoever, the language in the present s. 59A is explicit with respect to the exclusion of the judicial review by any court of any act or decision made by the Minister, Director General or the State Authority under the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in para. (2) of s. 59A. By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the Minister or the decision-maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.

We pause to note here that the Court of Appeal seems to introduce the doctrine of substantive fairness as a separate ground in its review of the administrative decision of the State Authority under the Act by invoking art. 8(1) read together with art. 5(1) of the Federal Constitution. The court also relied on *R. Rama Chandran*. See: pp 125-128.

In our view, Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognised. We are aware of the many facets of the concept of procedural fairness in common law which our courts have for decades adopted and we are aware of the consideration of fairness that has to be taken into account in relation to grounds for judicial review relating to "irrelevancy" as part of the "illegality" ground and to "irrationality" as arising from the "Wednesbury unreasonableness" ground. As was stated by Edgar Joseph Jr FCJ in *R. Rama Chandran (supra)* when he observed that courts can scrutinise decisions not only for process, but also for substance, and he certainly was not putting forward a new head for judicial review when he stated, at pp. 172 and 173:

It is often said that Judicial Review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions and Ors v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.

In this context, it is useful to note how Lord Diplock (at pp. 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:

> By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could arrive at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or less there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this

> head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

For the above reasons, we cannot agree with the Court of Appeal that the doctrine of substantive fairness can be invoked as a separate or additional ground of judicial review of an administrative decision. Here, on a clear wording of s. 59A, in our view, Parliament must have intended to conclusively exclude judicial review except on procedural defect under the Act or regulations made thereunder. In the words of Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government and Others* [1960] AC 260 at 286:

> It is a principle nor by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.

Our answer to Question No. 1 is therefore that the combined effect of the exclusion of the right to be heard provided in s. 59 of the said Act and the ouster clause provided in s. 59A thereof has excluded review in respect of the direction given by the State Authority under s. 65(1)(c) on any ground except in regard to any question relating to compliance with any procedural requirement of the Act or regulations made thereunder governing that act or decision.

Question No. 2

This question arose from the finding of the Court of Appeal on the interpretation of s. 65(1)(c) which comes under Part VII of the Act. In the opinion of Gopal Sri Ram JCA, the section did not expressly set out the circumstances for the State Authority to direct the director to exercise his power of cancellation. Parliament did not intend to confer an untrammelled power on the State Authority to direct the cancellation of an entry permit. That legislative intent was evidenced by the opening words of s. 65(1)(c), which say "In exercising his powers under Parts I to VI", thereby referring to the sections in Parts I to VI, among these being s. 9(1)(c) which circumscribes the power of cancellation. Therefore, in the context of an East Malaysian State, the statutory pre-conditions in s. 9(1)(c) *mutatis mutandis* govern the cancellation of an entry permit by the State Authority, and it follows that the State Authority in giving directions to cancel the permit must act within the scope of s. 9 of the Act.

In our view, the question to be answered here is quite straight-forward, *viz*, whether the provisions in Part VII, being a special law, have the effect of prevailing over any inconsistent provisions in Parts I to VI in their application to Sabah and Sarawak.

The crux of Datuk Foo's submission is that Part VII of the Act is a special law for East Malaysia and in its application to Sabah and Sarawak, the provisions in Part VII shall have the effect of prevailing over or overriding the inconsistent provisions in Parts I to VI. He reasoned that s. 1(2) clearly provides that the Act shall apply throughout Malaysia subject to Part VII. He cited s. 64(1) which states as follows:

> (1) Without prejudice to the general operation of Parts I to VI (in East Malaysia as in West Malaysia), as a general law for Malaysia as a whole, those Parts shall also have effect, subject to and in accordance with this Chapter, as a special law for each of the East Malaysian States as if for any reference to Malaysia (except in a reference to a Government in Malaysia) there were substituted a reference to the East Malaysian State.

He submitted that the section enabled Parts I to VI to be applicable to Sabah and Sarawak as a separate unit for immigration purposes, but subject to and in accordance with Part VII as a special law for each of the East Malaysian States. Datuk Foo laid stress on the words "subject to" by relying on the judgment of Neal J in *Government of the Federation of Malaya v. Surinder Singh Kanda* [1961] 27 MLJ 121 at 138:

> To test the conclusion to which I have come by following the method of approach adopted by the Attorney-General in his argument and endeavouring to give the words, "subject to," their ordinary meaning ... "subject to" must mean from that point of view "swallowed up" or "negatived by".

It was also pointed out that s. 66(1) provides that where a citizen is not entitled to enter an East Malaysian State under s. 66(1), Parts I to VI in their operation as a special law for the East Malaysian State shall apply to him as if he was not a citizen. The respondent here is such a person.

Datuk Foo contended that in construing the provisions in Part VII, as a special law for the East Malaysian States, consideration must be had to the objectives and background history of Part VII which concerned additional provisions regarding entry into Sabah and Sarawak under the Malaysia Agreement.

In this regard, we note that Part VII originated from the Immigration Act 1963, later revised and incorporated into the present Act 1959/63 in 1975. The 1963 Act was passed on the formation of Malaysia in September 1963. The bill for the 1963 Act was annexed to the Malaysia Agreement

concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore. Article V of the Malaysia Agreement states:

> The Government of the Federation of Malaya will take such steps as may be appropriate and available to them to secure the enactment before Malaysia Day by the Parliament of the Federation of Malaya of an Act in the form set out in Annex E to this Agreement for the purpose of extending and adapting the Immigration Ordinance, 1959, of the Federation of Malaya to Malaysia and of making additional provision with respect to entry into the States of Sabah and Sarawak; and the other provisions of this Agreement shall be conditional upon the enactment of the said Act.

The State Attorney General concluded that s. 65(1)(c) which comes under Part VII of the Act as special provisions for Sabah and Sarawak prevailed over the inconsistent provisions in Parts I to VI. As such, the director had no alternative but to comply with the direction to cancel any permit issued to a specified person given to him by the State Authority. Therefore, the Court of Appeal was wrong to hold that the appellant in giving directions to the director to cancel the respondent's entry permit must follow the provisions of s. 9 of the Act.

In our opinion, there is much force in the submission of the learned State Attorney General that Part VII as a special law for East Malaysia prevails over the inconsistent provisions in Part I to VI of the Act.

This was one of the terms of participation of Sabah and Sarawak in the new Federation of Malaysia as could be seen from the Report of the Inter-Governmental Committee which states *inter alia*:

> 16. Immigration
>
> The following arrangements should apply:
>
> (a) immigration into Malaysia should remain on the Federal List, but legislation should be enacted by the Federal Parliament to ensure that, except as provided in sub-paragraph (f) below, entry into the Borneo States will require the approval of the State concerned;
>
> (b) ...
>
> (c) the Federal Government should undertake in the formal agreement for the establishment for Malaysia to pass before Malaysia Day a law coming into operation on Malaysia Day, the draft of which would be agreed by the Governments of the Borneo States and scheduled to the format agreement and an outline of which is set out in sub-paragraph below;
>
> (d) ...

(e) ...

(f) the law referred to in sub-paragraph (c) should contain provisions to secure that:

(i) any person from outside Malaysia whose entry into a Borneo State the Government of that state considers is necessary for State purposes shall be given entry except in cases where the Federal Government, which will be consulted for this purpose, considers that it is desirable in the national interest that entry should be refused;

(ii) subject to Article 9(1) and to sub-paragraph (iv) below, admission to a Borneo State will not be granted to any other person or class of persons whether from inside or outside Malaysia, without the approval of the Government of the State concerned;

(iii) subject to Article 9(1) and to sub-paragraph (iv) below, any person who is present in a Borneo State contrary to the provisions of sub-paragraph (ii) above or whose presence is otherwise unlawful, whom the Government of the State wishes to be removed from the State, shall be so removed;

(iv) the provisions outlined in sub-paragraph (ii) and (iii) above do not apply to members officers of the Federal Government or any person or class of persons whose temporary presence in the state the Federal Government, after consultation with the State Government, considers is necessary in order to enable the Federal Government to carry out its constitutional and administrative responsibilities..

(v) ...; and

(g) ...

In dealing with Part VII of the said Act one must not forget the constitutional recognition under cl. (3) of art. 9 of the Federal Constitution relating to the special position of Sabah and Sarawak where Parliament may impose restrictions. While cl. (2) of art. 9 of the Federal Constitution provides that every citizen has the right to move freely throughout the Federation and to reside in any part thereof, this clause is made subject, *inter alia*, to cl. (3).

Clause (3) was added to art. 9 with effect from Malaysia Day, 16 September 1963 by s. 60(1) of the Malaysia Act 1963. Under s. 60(2) the said cl. (3) "shall apply to laws passed before Malaysia Day so as to impose restrictions with effect from Malaysia Day."

The said cl. (3) provides that so long as under the Constitution any other State is in a special position as compared with the States in Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by cl. (2) in respect of movement and residence and cl. (4) of art. 161E have also to be taken into account.

Thus it seems clear to us that the legislature in passing Part VII was undoubtedly giving effect to the above mentioned terms and art. V of the Malaysia Agreement agreed upon between the Federation of Malaya and Sabah. Indeed s. 64(1) referred to by the learned State Attorney-General employs clear language by the words "subject to and in accordance with this chapter" meaning that the application of Part I and VI is dependent and conditional upon Part VII. Since Part VII has been provided as a special law, the general provisions of Parts I to VI must give way to the special provisions of Part VII in accordance with the principle of *'generalibus specialia derogant'*.

For the above reasons we hold that the provisions in Part VII prevail over any inconsistent provisions in Parts I to VI in their application to Sabah and Sarawak as a special law.

Question No. 3

The Court of Appeal found that reasons have indeed been given in this case and once reasons are given by a public decision-maker for his decision, they may be examined by the court. The learned State Attorney General submitted that there was no requirement under s. 65(1)(c) of the Act for the State Authority to give reasons for its decision.

Section 65(1)(c) of the Act provides:

> In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State Authority, being directions:
>
> (a) ...
>
> (b) ...; or

(c) requiring him to cancel any Permit, Pass or Certificate issued to a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.

Datuk Foo contended that this is not a case where a fundamental liberty of a person guaranteed by the Federal Constitution is adversely affected in consequence of a decision. He submitted that the reasons given by Datuk Gulam Jelani in his affidavit were irrelevant and the Court of Appeal was therefore wrong to take those reasons into consideration.

For the respondent, it was argued that the State Authority is under a duty to give reasons in the present case where the right to livelihood is involved. Encik Shafee cited the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan (supra)* to support the contention that the State Authority is under the duty to give reasons. Speaking for the Federal Court, Edgar Joseph Jr. FCJ cited the case of *Marta Stefan v. General Medical Council* [1999] 1 WLR 1293 as follows:

> After dealing with the question whether there was an express or implied statutory obligation in the relevant legislation for the Committee to state reasons for decision, their Lordships concluded that there was no express statutory duty to state reasons for its decision nor were they able to spell out an implied obligation to state reasons.
>
> Nevertheless their Lordships found that the Committee had the power to give reasons and added:
>
> > that giving reasons can be beneficial and assist justice: (1) in a complex case to enable the doctor to understand the Committee's reason for finding against him; (2) where guidance can usefully be provided to the profession especially in difficult fields of practice such as the treatment of drug addicts; and (3) because a reasoned finding can improve and strengthen the appeal process ...
> >
> > The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis. (*R v. Royal Borough of Kensington and Chelsea; ex p Grillo* [1996] 28 HLR 94), and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers.

In considering the words in s. 65(1)(c), it is clear that there is no express statutory duty imposed on the State Authority to give reasons to the respondent. Insofar as the common law position is concerned, we adopt the proposition that was stated in *Marta Stefan (supra)* that the trend of the law is towards giving reasons, but on a case by case basis. However the trend has not lost sight of the established position of the law that there is no general duty universally imposed on all decision makers. Under s. 65(1)(c), the State Authority is not dealing with the respondent directly but instead is empowered to direct the Director of Immigration to cancel the respondent's entry permit. The power of cancellation would then be exercised by the director pursuant to the direction given by the State Authority. It is of course not reasonably expected that in giving the direction the State Authority must give reasons to the director. It therefore follows that the director cannot be expected to provide reasons to the respondent since the director is merely carrying out the directions of the State Authority. That being so, we agree with the submission of the learned State Attorney General that the question of giving reasons by the State Authority to the respondent does not arise. Accordingly, we hold that in exercise of the powers conferred upon the State Authority by s. 65(1)(c) of the Act, the State Authority is not required to give reasons. Since reasons have indeed been given in this case, we now need to consider whether the court is empowered to examine the reasons furnished by the State Authority later, *vide* the affidavit of Datuk Gulam Jelani filed in the proceedings commenced by the respondent to challenge the decision of the State Authority.

Having held that the State Authority is not required to give reasons under s. 65(1)(c) of the Act, it is our view that any reasons furnished by the State Authority later in the court proceedings cannot be examined and taken into account, for otherwise the intention of the legislature in giving the power to the State Authority to direct the cancellation of the entry permit would be rendered nugatory. The natural consequence of the examination of the reasons by the court would be that the court may find the reasons unreasonable and the decision to cancel the entry permit made by the director pursuant to the direction of the State Authority may then be quashed. This would fly in the face of the arrangements made by Sabah and the Federation of Malaya relating to matters on immigration, one of the terms of participation of Sabah in the new Federation of Malaysia. To recapitulate, one of the arrangements was "... admission to a Borneo State will not be granted to any other person or class of persons, whether from inside or outside Malaysia, without the approval of the Government of the State concerned" and that "any person ... whose presence is otherwise unlawful, whom the Government of the State wishes to be removed from the State, shall be so removed."

Our answer to Question No. 3 is that the State Authority is not required to give reasons for any of the directions it gives and if it does subsequently give reasons for court proceedings, the court is not empowered to examine them.

Question No. 4

The question which calls for determination is whether the exclusion of the right to be heard as provided in s. 59 of the Act in particular matters relating to the cancellation and revocation of the respondent's entry permit which effectively deprives the respondent his right to livelihood is unlawful and unconstitutional in the light of the express guarantees enshrined in arts. 5 and 8 of the Federal Constitution.

Section 59 of the Act states:

> No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under the Act.

Section 59 was a new section inserted by the Immigration (Amendment) 1989 (Act A 719) which came into force on 10 February 1989 and further amended by the Immigration (Amendment) Act 1997 (Act A 985) after the decision in *J.P. Berthelsen v. Director General of Immigration, Malaysia & Ors.* [1986] 2 CLJ 409; ([1986] CLJ (Rep) 160), where the Supreme Court held that the appellant was not afforded an opportunity to be heard before the cancellation of the employment pass which was granted to him for two years under reg. 19 of the Immigration Regulations 1963.

Abdoolcader SCJ, delivering the judgment of the court, at p. 418 (pp. 166-167) stated:

> In the light of the authorities we have adumbrated, we regard the appellant as so circumstanced in relation to the action of the first respondent as to be entitled to the observance of the rules of natural justice ...
>
> In the event, at the conclusion of the hearing it was clear that *certiorari* must go to quash the cancellation of the appellant's employment pass, and we ordered accordingly.

Indeed, the explanatory statement to the bill for Act A 719 states that "The new s. 59 seeks to exclude a person from being given an opportunity to be heard prior to the Minister or the Director General making an order against him in respect of any matter under the Act or any subsidiary legislation under it." In short, s. 59 in plain and clear words has excluded the *audi alterem partem* rule for the cancellation of the respondent's entry permit.

The primary submission of Encik Shafee is that the cancellation of the respondent's entry permit without the right of being heard infringed his right to livelihood which is a fundamental right guaranteed by arts. 5(1) and 8(1) of the Federal Constitution and since that right has been infringed, it was urged that s. 59 should be struck down for being unconstitutional.

Datuk Foo, on the other hand, submitted that the exclusion of the right to be heard under s. 59 of the Act does not infringe art. 5(1) and art. 8 of the Federal Constitution. He said art. 5 is not absolute and can be taken away by law duly passed by Parliament.

The section also does not offend art. 8(1).

Let us now consider the relevant constitutional provisions.

Article 5(1) provides:

> No person shall be deprived of his life or personal liberty save in accordance with law.

Article 8(1) provides that all persons are equal before the law and entitled to the equal protection of the law.

Article 9(2) and (3) states:

> (2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.
>
> (3) So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence.

First, art. 5(1) speaks of "life" and "personal liberty" and guarantees that a person's life and personal liberty is not to be deprived save in accordance with law.

The Court of Appeal at p. 107, citing its own decisions in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 2 CLJ 771 and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665, and the Federal Court case of *R. Rama Chandran* held that the expression 'life' in art. 5(1) is not limited to mere existence but is a wide concept and that the words "personal liberty" should be similarly interpreted. It went on to say that "any other approach to construction will necessarily produce an incongruous and absurd result. For, 'life' and 'personal liberty' are both equally dynamic concepts and should be treated in like fashion."

In our view, the words "personal liberty" should be given the meaning in the context of art. 5 as a whole. In this respect, we adopt what has been said by Suffian LP in *Government of Malaysia & Ors. v. Loh Wai Kong, (supra)*. Speaking for the Federal Court, comprising five Federal Court judges in deciding whether a citizen has a right to leave the country, to travel overseas, and a right to a passport, this is what he said (at p. 34):

> Article 5(1) speaks of personal liberty, not of liberty simpliciter. ... It is well settled that the meaning of words used in any portion of a statute – and the same principle applies to a constitution – depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing "personal liberty" in article 5(1) one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except any enemy alien, freedom from being "unlawfully detained"; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to have a passport. Indeed freedom of movement is dealt with specifically in article 9 which, however, only guarantees citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein.

We note that neither in the instant case nor in *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor. (supra)* did the Court of Appeal refer to *Loh Wai Kong* and we cannot understand why. Unfortunately, too, in the majority judgment of the Federal Court in *R. Rama Chandran*, although reference was made to the Court of Appeal decision of *Tan Teck Seng* and to art. 5 in the context of the expression "life", the reference was only a brief reference and we note, too, that *Loh Wai Kong* was not cited let alone considered by the Federal Court in *R. Rama Chandran.*

We therefore disagree with the Court of Appeal that the words "personal liberty" should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life. We are of the view that other matters which go to form the quality of life has been similarly enshrined in Part II of the Constitution under 'FUNDAMENTAL LIBERTIES' *viz*, protection against retrospective

criminal laws and repeated trials (art. 7); equality (art. 8); freedom of speech, assembly and association (art. 10); freedom of religion (art. 11); rights in respect of education (art. 12) and rights to property (art. 13).

We agree with the learned State Attorney General that the entry permit only allows the respondent to enter and reside in Sabah, but *ipso facto* the entry permit does not confer any right to livelihood to the respondent.

We would like to add that as the respondent is not a person belonging to the State of Sabah, he could not have been accorded any right to earn a livelihood in that state. Moreover, the State of Sabah's exclusive control on immigration is enshrined in art. 161E(4) of the Federal Constitution, which we shall discuss later. At any rate, the right to set up the practice is only incidental to the right to enter and reside in Sabah.

We were referred by the learned State Attorney General to *S Kulasingam & Anor. v. Commissioner of Lands, Federal Territory & Ors.; Public Prosecutor v. Yee Kim Seng;* and *Government of Malaysia & Anor. v. Selangor Pilot Association (supra)* for the proposition that the constitutional guarantee under art. 5(1) is not absolute. It can be taken away by law duly passed by Parliament. Here, we need to refer briefly to the Privy Council decision in *Selangor Pilot Association*. The Association had been carrying on the business of providing pilotage services within certain areas of the Port of Klang and they had in fact a monopoly of the business. The Port Authorities Act 1963 was amended by the Port Authorities (Amendment) Act 1972 which added two new sections, the effect of which was to prohibit the respondents from carrying on their business within the pilotage districts. The second appellant, Lembaga Pelabohan Kelang took over the physical assets of the respondents and paid compensation for them. The respondents asked for compensation for loss of goodwill and loss of future profits but this was refused. The respondent applied to the High Court, *inter alia*, for a declaration that they were entitled to compensation for the goodwill of their business. Alternatively they claimed a declaration that s. 35A (added by the Port Authorities (Amendment) Act) was unconstitutional as it was inconsistent with art. 13 of the Federal Constitution. The High Court dismissed the claim. The Federal Court allowed the appeal. On further appeal to the Privy Council, the appeal was allowed. Viscount Dilhorne (delivering the majority judgment of the board) stated (at pp. 135-136):

> Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation, also leads to compulsory acquisition or use.

> If in the present case the Association was in consequence of the amending Act deprived of property, there was no breach of Article 13(1) for that deprivation was in accordance with a law which it was within the competence of the Legislature to pass.

Similarly, in *PP v. Yee Kim Seng,* it was held that art. 5(1) of the Federal Constitution was not infringed because the accused was not going to be deprived of his life or personal liberty except in accordance with law. And the law in that case was the Internal Security Act 1960 which was a perfectly valid law passed by Parliament.

In *Kulasingam,* Abdoolcader J (as he then was) said at p. 211:

> The legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees.

It should be borne in mind that there is a strong presumption of the constitutional validity of an enactment or the impugned section with the burden of proof on whoever alleges otherwise. (*Public Prosecutor v. Datuk Harun bin Haji Idris & Ors*. [1976] 2 MLJ 116 at p. 117; *PP v. Su Liang Yu* [1976] 2 MLJ 128).

Secondly, art. 8(1) provides that all persons are equal before the law and are entitled to the equal protection of the law. Equality before the law means the equal subjection of all persons to the law. See: *Datuk Harun bin Haji Idris*'s case, *(supra)* at p. 117.

Thirdly, art. 9(2) gives the citizen the right to move freely throughout Malaysia and to reside in any part thereof. However, these rights are subject to cl. (3), which according to *Andrew Harding's Law, Government and the Constitution in Malaysia* at p. 225, "clearly refers to Sabah and Sarawak, both of which enjoy such a special position. The purpose of the qualification is to ensure that constitutional challenges cannot be brought against these States in respect of the use of their special immigration powers, which may be used to control entry from Peninsular Malaysia." See also *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia* [1979] 2 MLJ 101.

It is clear from the authorities that the constitutional rights as guaranteed under art. 5(1) of the Federal Constitution can be taken away in accordance with law. Hence, s. 59 of the Act, which removes the *audi alterem partem* rule, which was duly enacted by Parliament is valid and constitutional.

In view of the presumption of constitutionality of an Act of Parliament and here the burden of showing otherwise is on the respondent which he has not satisfied us, it is our conclusion that s. 59 of the Act is valid and constitutional.

Question No. 5

The question here is whether the amended s. 65(1)(c) of the Act can and does operate retrospectively so as to prejudice the accrued rights of the respondent which rights as contended by the learned counsel, were available to him before the amendment. Alternatively, whether the amendment contravened the Agreement Relating to Malaysia 1963 and the Report of the Inter Governmental Committee 1962.

Previously s. 65(1)(c) of the Act read as follows:

> (1) In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State Authority, being directions:
>
> (a) ...
>
> (b) ...
>
> (c) requiring him to **exercise any discretion vested in him to** cancel any Permit, Pass or Certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a special person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the state. (emphasis added)

By the Immigration (Amendment) Act 1997 (Act 985) which came into force on 1 February 1997 the words "exercise any discretion vested in him to" were deleted.

Datuk Foo in his written submission stated that the purpose of the amendment is to remove any doubt that the director has a discretion whether or not to comply with the direction of the State Authority.

Secondly, that the effect of the amendment is to make it beyond doubt that the director shall comply with any directions given to him by the State Authority being directions requiring him to cancel any permit, pass or certificate issued to a specified person.

Thirdly, even without the deletion of the said words, the director has to comply with the direction of the State Authority to exercise any discretion vested in him to cancel any permit, pass or certificate. According to him, the "discretion" referred to therein does not mean he has a choice whether to comply or not to comply. The "discretion" means the discretionary

power vested in him which he must exercise to comply with the directions of the State Authority. If it were otherwise, it flies in the face of s. 65(1)(c) which states that the director shall comply with the direction of the State Authority. Therefore, despite the deletion of the said words, there is no change in substance in the section.

We find there is much force in this argument. We agree with the learned State Attorney General that the effect of s. 65(1)(c) prior to or after the amendment is still very much the same because under sub-s. (1) of s. 65 the director shall comply with any directions given by the State Authority being directions requiring him under para. (1)(c) to cancel any permit, pass or certificate issued to a specified person etc.

On Encik Shafee's submission that the amendment to s. 65(1)(c) cannot have any retrospective effect so as to impair the respondent's vested or accrued right and/or legitimate expectation, our view is that the amendment has no retrospective effect having regard to the fact that the amendment came into force on 1 February 1997 and the respondent's entry permit was cancelled on 12 November 1997. We agree with the learned State Attorney-General that it would be unlawful for the director to avail himself of the provisions of s. 65(1)(c) prior to the amendment. He had to act under the amended section.

On the question whether the respondent has any accrued right Encik Shafee submitted that the respondent has a substantive right accruing to him in the form of rights enshrined in the rules of natural justice. He submitted that when the respondent was issued an Entry Permit in December 1995 he had an accrued right. The respondent has been continuously residing in Sabah with his wife and children. He has no intention of becoming a permanent resident outside Sabah. The respondent's only source of livelihood is his legal practice and he has been practicing law ever since he was admitted to the Sabah Bar on 23 October 1985. Therefore, he has the right to livelihood in Sabah, which is one of the fundamental liberties guaranteed under Part II of the Federal Constitution.

In reply, the learned State Attorney General submitted that the respondent has no accrued rights acquired under the entry permit. We agree with him. We had in fact dealt with this point under Question No. 4 when we hold that the entry permit only allows the respondent to enter and reside in Sabah for two years lawfully and the entry permit does not confer any right to livelihood to the respondent. Neither the personal affairs relating to his family nor his legal practice are accrued rights conferred by the entry permit.

Encik Shafee further submitted that the respondent has a legitimate expectation of being accorded rights in compliance with the principles of natural justice and which includes expectation which go beyond enforceable legal rights, provided they have some reasonable basis.

In our view, the respondent could not be said to have any legitimate expectation that his entry permit would not be cancelled given the express provision under the Act that such entry permit may be cancelled at any time. In addition, there was no promise or representation made by the State Authority that his entry permit would not be cancelled. See Council of *Civil Service Unions & Others v. Minister for the Civil Service* [1985] 1 AC 374.

On the constitutionality of the amendment to s. 65(1)(c), Encik Shafee contended that the amendment was not in compliance with art. 161E(4) read with art. 161E(2) of the Federal Constitution because there was no concurrence of the Yang di-Pertua Negeri of Sabah to the said amendment.

In reply Datuk Foo submitted that art. 161E(4) does not apply to the amendment to s. 65(1)(c) of the Act since the amendment does not impinge upon the rights and powers of the State of Sabah or Sarawak.

Article 161E(4) reads:

> In relation to any rights and powers conferred by the federal law on the Government of the State of Sabah and Sarawak as regards entry into the State and residence in the State and matters connected therewith ... Clause (2) shall apply ...

Clause (2) of art. 161E states that no amendment shall be made to the Federal Constitution without the concurrence of the Yang diPertua Negeri of Sabah or Sarawak if the amendment is such as to affect the operation of the Federal Constitution as regards any of the following matters:

(a) Malaysian citizenship and the equal treatment of persons born or resident in the State;

(b) the constitution and jurisdiction of the High Court in Sabah and Sarawak, and the appointment, removal and suspension of its judges;

(c) the State's legislative and executive powers and financial arrangements between the Federal and the State;

(d) religion and language in the State; and the special treatment of natives of the State; and

(e) the quota of Members of Parliament allocated to the State in proportion to the total number of members of the House of Representatives.

It was submitted that the amendment to s. 65(1)(c) does not fall under any of the five matters enumerated above. The amendment to s. 65(1)(c) merely took away the discretion vested in the director in complying with the directions of the State Authority. The amendment does not in any way affect the rights and powers of the State as regards immigration matters. As such there is no requirement for compliance with art. 161(E)(2) and art. 159(3) of the Federal Constitution.

We agree with Datuk Foo's submission. We are of the view that the spirit and intention of the Agreement Relating to Malaysia 1963 and the Report of the Inter-Governmental Committee has not in any way been contravened. Encik Shafee has not shown to our satisfaction that the amendment is unconstitutional and since it is trite that a statute is always presumed constitutionally valid until proved otherwise (*Datuk Harun Haji Idris (supra)*), we therefore rule that the amended s. 65(1)(c) of the Act is valid.

For the record, Dato' Zaitun Zawiyah, senior federal counsel, who appeared for the director, supported the submission of the learned State Attorney General. On the issue of "morality" in s. 9(1)(c) of the Act, she however agreed with the Court of Appeal that it referred to public morality and not private morality. In our view, this cannot be so as unlike the words "order", "security" and "health" appearing before it in that same paragraph, the word "public" has not been used for "morality".

Conclusion

We have answered the five questions of law at the end of each question in numerical order. For reasons stated, we make the following orders in respect of these appeals:

(1) For Appeal No. 01-1-99(S), the appeal is allowed with costs. The order of Ian Chin J, made on 26 December 1997 is upheld. The deposit shall be refunded to the appellant.

(2) For Appeal No. 01-2-99(S), we dismiss the appeal with costs. The deposit shall be paid to the State Authority to account of taxed costs.

Lastly, we would like to place on record that the presiding judge of these appeals was the Chief Judge of the High Court in Malaya, who before the completion of this judgment passed away on 24 December 2001. In the light of s. 78 of the Courts of Judicature Act 1964, I have shown this judgment in draft to my learned brother, Abdul Malek Ahmad FCJ, who has agreed with it.